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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 49

PACIFIC STEAMSHIP COMPANY, PETITIONER,

vs.

CARL G. PETERSON.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

BENJAMIN S. GROSSCUP,
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J. C. DAVIES,
Counsel for Petitioner.

(33,159)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1928.

No. 707

PACIFIC STEAMSHIP COMPANY, A CORPORATION, PETITIONER,

vs.

CARL G. PETERSON, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON.

Comes now Pacific Steamship Company, a corporation, and in support of this, its application for a writ of certiorari to be directed to the Supreme Court of the State of Washington, respectfully shows and alleges:

That petitioner is engaged in the transportation of freight and passengers by water between ports on Puget Sound and ports of the State of California. That in the month of December, 1924, it was the owner

of the steamship *Admiral Dewey*, and was engaged in operating the said steamship in said commerce. That on or about the 18th day of December, 1924, the said steamship *Admiral Dewey* sailed from the port of Seattle for the port of San Francisco. That said vessel was loaded with freight and passengers.

That the respondent was in the employ of the petitioner on said vessel in the capacity of a boatswain. That on or about the 20th day of December, 1924, while the said vessel was pursuing its usual course in a southerly direction along the Pacific Coast it ran into a gale and shipped some water over its deck, which caused a cargo of boxed clams and oysters stowed upon the aft port deck to become more or less awash. The mate upon said vessel observed this cargo awash, and believing it to be necessary or advisable for the safety of the passengers, crew and ship to secure the same, ordered the respondent to take his crew and lash the same. This the respondent undertook to do, and while so engaged a heavy sea came over the stern of the ship, struck respondent, knocked him down, washed a box of clams against him and injured his left knee.

About two days thereafter the vessel reached the port of San Francisco, and the respondent, at his request, was immediately taken to the Marine Hospital at said port by petitioner for maintenance and cure.

Respondent was provided with maintenance and cure for said injury by petitioner at said hospital until April 3, 1926, at which time he voluntarily left the same. That while respondent was at said hospital he demanded and received his wages to the end of the voy-

age on which he was injured, which constituted about two weeks' pay, amounting to the sum of $41.10.

That on or about June 3, 1926, respondent instituted the present action against petitioner by filing his complaint in the Superior Court of the State of Washington for King County. Paragraph II of said complaint reads as follows:

> "That the plaintiff prosecutes this action under and by the terms and provisions of Section 20 of the Act of Congress of March 4, 1915, as amended by Section 33 of theAct of June 5th, known as the 'Jones Act'" (R., 1).

Respondent charged negligence of a fellow servant. The charging part of his complaint is found in Paragraph V and is as follows:

> "That, nevertheless, the mate negligently ordered the plaintiff to lash the said cargo, and the said officer in command of the said vessel negligently and carelessly failed and omitted to have the vessel hove to or slowed down, during the said work, to prevent the sea breaking over the decks, and carelessly and negligently failed to install and provide a life line on the after port quarter" (R., 2).

No contention was made by respondent in his complaint that his injuries were due to the unseaworthiness of the vessel or defective equipment.

Petitioner filed its answer to said complaint (R., 3), which answer consists of general and special denials, affirmative allegations and an affirmative defense.

The petitioner's answer to Paragraph II of respondent's complaint, above quoted, is as follows:

> "Denies each and every allegation and all allegations contained in Paragraph II of plaintiff's complaint, and in this connection alleges that long prior to the commencement of plaintiff's action set out in his said complaint, the plaintiff elected to receive wages to the end of the voyage, and maintenance and cure for any injuries which he received on said voyage; and the plaintiff has received his wages to the end of the voyage and has received maintenance and cure for any injury received, and received the same prior to the filing of his said complaint herein, and he cannot now maintain an action under the Jones Act, or any other action, for damages for any injuries received upon the voyage set out in his complaint" (R., 4).

Petitioner also set up an affirmative defense to respondent's complaint, Paragraph III of which reads as follows:

> "That while the said S. S. *Admiral Dewey* was on a voyage between the ports of Puget Sound and ports of California, it had laden on board a cargo of boxed clams and oysters lashed on the after port deck. That on or about the 28th day of December, 1924, while on said voyage, the said vessel encountered a heavy sea, which caused the said cargo to be and become awash. That the plaintiff attempted to lash the said cargo, and while so engaged, a sea broke over the aft port deck of said vessel and caused a box of said cargo to strike plaintiff,

and injured his left knee. That immediately thereafter plaintiff's leg was placed in splints by the mate, and as soon as said vessel arrived at the port of San Francisco, California, plaintiff was by the defendant removed from said steamship and conveyed to the Marine Hospital at San Francisco, for maintenance and cure. That plaintiff has received from the defendant at said hospital maintenance and cure as far as medical and surgical attention can reasonably effect a cure. That the plaintiff received his wages from the defendant to the end of the voyage, including a bonus totaling the sum of $41.10, prior to the commencement of this suit. That the plaintiff, in accepting said wages to the end of the voyage and permitting defendant to take him to said Marine Hospital at San Francisco, California, and in consenting to go thereto for maintenance and cure for the injuries he received, elected to take compensation for said injury under the general admiralty and maritime law in such cases made and provided, and he has been fully and completely compensated by defendant for said injuries under the said general admiralty and maritime law, and the plaintiff made said election to accept compensation and received the same under the general admiralty and maritime law long prior to the filing of this suit, and the plaintiff cannot now elect to sue or maintain this action for damages under Section 20 of the Act of Congress of March 4, 1915, as amended by Section 33 of the Act of June 5, 1920, known as the 'Jones Act' " (R., 6 and 7).

Petitioner prayed in its answer for judgment dismissing the plaintiff's cause of action. The respondent thereafter filed a motion to strike from petitioner's answer the affirmative allegations set up in its answer to said Paragraph II of respondent's complaint (R., 7). The respondent also filed a demurrer to the affirmative defense contained in petitioner's answer on the ground that the facts set out in the affirmative defense did not constitute a defense to respondent's action (R., 8). The motion and demurrer came on for hearing before the trial court. The motion to strike was granted, and the demurrer was sustained (R., 8). The court allowed the petitioner to file an amended answer. This the petitioner did (R., 9), and in its amended answer set up more in detail the affirmative defense contained in its original answer above quoted, and added thereto the following allegation:

> "That at the beginning of said voyage and at all times during the continuation of the same the said steamship *Admiral Dewey* was properly equipped, manned, victualled and in all respects seaworthy" (R., 12).

Respondent moved to strike from the files petitioner's said amended answer (R., 13), which was granted by the court (R., 14). The trial court by its ruling above specified held that where a seaman has received a personal injury in the course of his employment and has demanded and received maintenance and cure for said injuries as far as medical and surgical skill can effect a cure, and has demanded and received wages to

the end of the voyage on which he was engaged at the time of the injury does not thereby elect to receive compensation for his injuries under the general admiralty or maritime law and is not estopped thereby from thereafter recovering full common law damages for the same injuries under Section 33 of the Merchant Marine Act, sometimes called the Jones Act.

It is this holding of the trial court, affirmed by the Supreme Court of the State of Washington, of which the petitioner complains.

This action came regularly on for trial before the trial court on the respondent's complaint and the special and general denials contained in petitioner's original answer. During the trial, and before judgment, the same question of law was raised in various ways, and the same ruling was made by the trial court. As a result of the trial, a judgment was entered in favor of the respondent and against the petitioner by the trial court in the sum of $12,500 and costs of suit (R., 30).

Petitioner thereafter appealed from said judgment of the trial court to the Supreme Court of the State of Washington (R., 31), and filed its supersedeas and cost bond on said appeal in the sum of $25,500 (R., 32). The petitioner in its assignment of errors in the Supreme Court specified and complained against the ruling of the trial court above set forth (R., 32-34).

This cause was heard before Department 2 of the Supreme Court of the State of Washington, and the court by its decision rendered November 3, 1927 (R., 34), held that the rulings of the trial court above specified were not error, and affirmed the judgment.

Peterson v. Pacific S. S. Co., 261 Pac. Rep., 115.

In due course the petitioner filed in said court its petition for rehearing before the full court (R., 47), which petition was denied by the court on December 7, 1927 (R., 54).

The judgment in favor of the respondent and against the petitioner has become final in so far as any relief can be secured by petitioner in the courts of the State of Washington. An order has been made and entered by the Supreme Court of the State of Washington staying proceedings on said judgment, pending the petition to this Court for a writ of certiorari (R., 55).

Reasons Relied on for Allowance of the Writ.

It clearly appears from the above summary of the facts and the matter involved in this case that the respondent contended in the courts of the State of Washington that a seaman who received a personal injury in the course of his employment has the right of election and must elect whether he will take compensation for the injuries under the general admiralty and maritime law, called by this Court the old rules, or seek compensation for his injuries under Section 33 of the Merchant Marine Act, designated by this Court as the new rules. It also clearly appears that the Supreme Court of the State of Washington in its final judgment in this cause held that a seaman for injuries received in the course of his employment, after demanding and receiving wages, maintenance and cure for the injuries, which in this case constituted full and complete compensation under the old rules, may sue and recover full

and complete common-law damages for the same injury under the new rules.

Whether an injured seaman must elect to receive compensation under the old rules or under the new, or whether he can recover full compensation under both, is a question of great importance and one which affects materially the welfare of the American Merchant Marine, as well as American seamen throughout the length and breadth of this country. It is a question which has not been directly decided by this Court, and is one of such importance and so substantially affects the welfare of the shipping interests of this country, which the United States Government, as well as private capital, is making heroic efforts to advance, that petitioner respectfully submits this Court should early decide.

A decision of this question involves an interpretation of Section 33 of the Merchant Marine Act, particularly the words "at his election," found therein, and, while this Court has not definitely decided this question, it has construed that act on several occasions and in its decisions construing the act has clearly laid down certain rules and principles which petitioner believes necessarily points to a different conclusion than that reached by the Supreme Court of the State of Washington, as will more fully appear in the accompanying brief.

Wherefore your petitioner respectfully prays that a writ of certiorari may issue out of and under the seal of this Court directed to the Supreme Court of the State of Washington, commanding said court to certify

and send to this Court on a date certain to be therein designated, a transcript of the record of the proceedings in said Supreme Court of the State of Washington in said cause therein entitled "Carl G. Peterson, respondent, v. Pacific Steamship Company, a corporation, appellant," and numbered 20749, to the end that said cause may be reviewed and determined by this Court, as provided by the provisions of Section 237B of the Judicial Code, as amended by the Act of Congress of February 13, 1925, and that this petitioner may have such other and further relief in the premises as to this Court may seem appropriate, and that the judgment of the said Supreme Court of the State of Washington in this cause and every part thereof be reversed and set aside by this Honorable Court.

Respectfully submitted,

BENJAMIN S. GROSSCUP,
W. CARR MORROW,
J. O. DAVIES,

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1927.

No. 707

PACIFIC STEAMSHIP COMPANY, PETITIONER,

vs.

CARL G. PETERSON.

SUPPORTING BRIEF.

Statement.

There is but one question of law which the petitioner seeks to have reviewed by this Court; that question is: Can a seaman who has received a personal injury in the course of his employment, after having demanded and received from his employer maintenance and cure for the injury received and wages to the end of the voyage, thereafter maintain an action under Section 33 of the Merchant Marine Act and recover full common-law damages for the same injury?

Jurisdiction.

The answer to this question requires an interpretation and construction of Section 33 of the Merchant

Marine Act, 41 Stat., 1007, and particularly the words, "at his election" found therein.

The material part of said section reads as follows:

> "That any seaman who shall suffer personal injury in the course of his employment may *at his election* maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply."

If the words "at his election" mean election between the old rules and the new, as contended by respondent, the decision of the Supreme Court of the State of Washington holding that the injured seaman may recover compensation under both the old and the new rules deprive the petitioner of valuable and substantial rights under the said statute, and this Court clearly has jurisdiction to review by certiorari the final judgment of that court under Section 237-B of the Judicial Code, as amended by Act of Congress on February 13, 1925.

Argument and Authorities.

The contention of the petitioner in the Supreme Court of the State of Washington was and now is that, under the law as it now exists and existed at the time of respondent's injury, a seaman for personal injury received has two separate and distinct systems of law measuring the relief which he may demand of his employer—the allowances provided by the general maritime law, the old rules, or common-law damages under

Section 33 of the Merchant Marine Act, the new rules, that the seaman must elect under which he will seek his compensation and cannot have both, or part of one and part of the other.

The law governing the relation between a seaman and a ship and its owner, under the old rules, after a most careful historical research, was summarized by this Court in the case of

The Osceola, 189 U. S., 158,

as follows:

> "1. That the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued.
>
> "2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. (Scarff *v.* Metcalf, 107 N. Y., 211.)
>
> "3. That all members of the crew, except perhaps the master, are, as between themselves, fellow servants, and hence seamen cannot recover for injuries sustained through the negligence of another member of the crew beyond the expense of their maintenance and cure.
>
> "4. That the seaman is not allowed to recover an indemnity for the negligence of the master, or any member of the crew, but is entitled to

> maintenance and cure, whether the injuries were received by negligence or accident."

Petitioner alleged in his answer that the respondent prior to the bringing of this action had demanded and received wages, maintenance and cure for his injuries, and that the ship was seaworthy at the time. These allegations were found to be true by the Supreme Court in its opinion. Respondent, therefore, prior to the bringing of this action, received full compensation for his injuries under the law announced in the above case.

These rules were in full force and effect and governed the relation of seaman to the ship and his employer at the time the Congress enacted the above-quoted statute.

The question is: What was the intention of Congress in the enactment of that statute? Did Congress intend to abolish the law as laid down in that case? Or did Congress intend to change or modify the law therein announced? And if so, in what particular? Or did Congress intend to supplement and add to those rules further and additional liability? Or did Congress intend to allow the rules laid down in that case to stand unchanged and unmodified and merely add thereto new rules and new rights which a seaman might have, with the right to elect between the two?

The answer to these questions depends almost wholly upon the correct interpretation of the words "at his election" found in the statute.

The words "at his election" are in frequent use and their meaning has been frequently defined by the courts, so frequently that there now can be no dispute

as to their meaning. It certainly must be presumed that Congress knew the meaning of those words when it passed the statute and intended to give them their well-defined meaning and effect. Generally speaking, the words in substance and fact mean that a person who has a right of election must choose between one of two things—that he cannot have both, nor a part of one and a part of the other.

3 Words and Phrases, pp. 2336-2337.

The Supreme Court of the State of Washington, by its decision, held that the fact that the respondent had demanded and received his wages, maintenance and cure for the injury, together with the fact that the injury was not due to any unseaworthiness of the vessel, did not constitute an election to take under the old rules and constituted no bar to the present action to recover full common-law damages for the same injury under the new rules.

Under the decision of the Supreme Court of the State of Washington, the statute now reads as follows:

> "That any seaman who has suffered personal injury in the course of his employment may, after having received full compensation for such injury under the general maritime law as it now exists, maintain an action for damages at law, with the right of trial by jury, etc."

The petitioner respectfully requests this Court to determine whether or not the Supreme Court of the State of Washington was right in eliminating from the statute the words "at his election" found therein, and

substituting in place thereof the following words: "after having received full compensation for such injury under the general maritime law as it now exists."

While this Court has not passed directly upon this question, we believe that the conclusions reached by the Supreme Court of the State of Washington are contrary to both the word and spirit of the decision of this Court construing this same statute.

In the case of

Panama Railway v. Johnson (264 U. S., 375),

this Court, in construing this statute, said:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seaman to do so. On the contrary, it brings into that law new rules drawn from another system and *extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules or that provided by the new rules.* The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system."

Again, in the same decision, the Court said:

> "A further objection urged against the statute is that it conflicts with the due process of law clause of the Fifth Amendment in that it permits injured seamen to elect between varying measures of redress and between different forms of action without according a corresponding right to their employers, and therefore is unreasonably discriminatory and purely arbi-

> trary. The complaint is not directed against either measure of redress or either form of action, but only against the right of election as given. Of course the objection must fail. There are many instances in the law where a person entitled to sue may choose between alternative measures of redress and modes of enforcement; and this has been true since before the Constitution. But it has never been held, nor thought so far as we have been advised, that to permit such a choice between alternatives otherwise admissible is a violation of due process of law. In the nature of things, the right to choose cannot be accorded to both parties, and, if accorded to either, should rest with the one seeking redress rather than the one from whom redress is sought."

In the case of

> Engel v. Davenport, 271 U. S., 33,

this Court, in deciding the question whether the plaintiff had elected to bring his action under the old rules or the new, after quoting with approval the language of this Court in the case of Panama Railway v. Johnson, said:

> "1. The present suit is not brought merely to enforce the liability of the owner of the vessel to indemnify for injuries caused by a defective appliance, without regard to negligence, for which an action at law could have been maintained prior to the Merchant Marine Act, Carlisle Packing Co. v. Sandanger, 259 U. S., 255; and we need not determine whether if it had

> been thus brought under the old rules, the State statute of limitations would have been applicable. See Western Fuel Co. v. Garcia, 257 U. S., 233. Here the complaint contains an affirmative averment of negligence in respect to the appliance. And, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that act, in which the petitioner, *instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules* in an action at law based upon negligence, in which he not only assumes the burden of proving negligence, but also, under Section 3 of Employers' Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part. This conclusion is in harmony with the Panama Railroad case, pp. 382, 383, in which the complaint charged that the injuries resulted from negligence in providing a defective appliance and in other respects."

This Court, in the very recent case of Baltimore S. S. Co. v. Phillips, 47 Supreme Court Reporter, 600, held it was error for a trial court to allow a seaman maintenance and cure in an action based upon negligence, that is, an action brought under the new rules.

The petitioner respectfully submits that this Court in the above-cited case has firmly established the following propositions in law:

1. That the maritime law as it now exists affords to an injured seaman two separate and distinct grounds for relief or causes of action; one, to recover the allow-

ances provided by the old rules; the other, to recover damages provided by the new.

2. That he may pursue either at his election.

3. That he must elect under which he will take.

4. That he cannot recover under both, or part of one and part of the other.

The inferior Federal courts, so far as petitioner has been able to ascertain, have uniformly held that Congress, by the enactment of Section 33 of the Merchant Marine Act did not change, modify or repeal in any way the old rules as laid down by this Court in the case of *The Osceola;* that Congress merely brought into maritime law new rules, and that an injured seaman might elect and *must* elect under which he will seek compensation for his injury, and that he could not have both, or part of one and part of the other; that the seaman's rights under the old rules and the new were separate and distinct and could not be commingled.

Kuhlman *v.* W. A. Fletcher Co., 20 Fed. (2d), 465.

Lorange *v.* Alaska S. S. Co., 298 Fed., 547.

Wagstaff *v.* U. S., 281 Fed., 877.

Hughes *v.* Alaska S. S. Co., 287 Fed., 427.

Phillips *v.* Baltimore S. S. Co., 295 Fed., 323.

Rosinski *v.* Conners, 21 Fed. (2d), 591.

In the case of Kuhlman *v.* W. A. Fletcher Co., *supra*, plaintiff brought an action on the common-law side of the Federal district court, based upon negligence; he

afterwards sought by motion and amendment to the complaint to transfer his action to the Admiralty side of the court and to recover for injuries under the old rules. The trial court refused to allow the amendment to the complaint and refused to transfer the case from the common-law side of the court to the Admiralty side. After judgment, the plaintiff appealed to the Circuit Court of Appeals for the Third Circuit and alleged error on the part of the trial court in its said ruling. The circuit court of appeals, in deciding this question, was required to interpret Section 33 of the Merchant Marine Act, and in construing this section said:

> "This section broadened the maritime law by giving a seaman a new right—a right at law—through proceedings *in personam*, according to the course of the common law, on the common-law side of Federal district courts. State courts also have like jurisdiction. Engel v. Davenport, 271 U. S., 33; 46 S. Ct., 410; 70 L. Ed., 813. By so doing the Congress did not abrogate his old action in Admiralty, but gave him an entirely new action and allowed him a clear option to assert his old action in Admiralty on the Admiralty side of the district court with trial to the court or to assert his new action, based on negligence, on the law side with right of trial by jury. Panama R. R. v. Johnson, 264 U. S., 375; 44 S. Ct., 391; 68 L. Ed., 748; Engel v. Davenport, 271 U. S., 33, 36, 46; S. Ct., 410; 70 L. Ed., 813. If he elect the latter, he foregoes the advantages which the Government extends to seamen as its wards and places himself in the same relation to his employer as a railway employee engaged in interstate commerce bears to his em-

> ployer, with different yet certain advantages and certain disadvantages. Engel *v.* Davenport, 271 U. S., 33, 36, 46; S. Ct., 410; 70 L. Ed., 813. These old and new rights may not be commingled, but must be asserted separately in the forum which has jurisdiction of them respectively. The West Jester (D. C.), 281 F., 877, 878."

The injured seaman has no right to wages, maintenance and cure except under the provisions of Paragraphs 1 and 4 of the old rules, as announced in *The Osceola* case, and unless his injury was due to the unseaworthiness of the vessel, the receipt of wages, maintenance and cure constituted full and complete compensation for the injuries.

Under Paragraphs 1 and 4, if the old rules are still in force, the respondent has received full compensation for his injuries under the old rules, and if the respondent was required to elect between the old rules and the new, he cannot, after having received full compensation under the old rules, maintain an action under the new. Allowing respondent to do that would give the respondent relief under both, compel petitioner to pay double compensation for the same injury and thus render this statute unconstitutional.

It seems to petitioner that the decision of the Supreme Court of the State of Washington, holding that the respondent might recover under both the old and the new rules, is contrary to both the letter and the spirit of the statute, as well as the decisions of this Court.

Whether the decision of the Supreme Court of the State of Washington is correct or incorrect, we respectfully submit that the question is of such general importance to the welfare of the American Merchant Marine that the question ought to be decided by this Court.

It seems quite clear and obvious that the Federal district and circuit court of appeals have decided this question contrary to the decision of the Supreme Court of the State of Washington, and that the said Federal courts will not, out of deference to the Supreme Court of the State of Washington, change their views or conclusions which they had previously reached concerning the interpretation of a Federal statute, and unless this Court takes jurisdiction and decides this question, there will be one rule of law in the Federal courts and another in the State courts, and the maritime law will not have that uniform application throughout this country contemplated by the Constitution.

We respectfully submit that the petition for a writ of certiorari should be granted.

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